Supreme Court, U.S.
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No. 97-1044

In The

Supreme Court of the United States

October Term, 1997

EARL FOREMAN,

Petitioner,

vs.

BABCOCK & WILCOX COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

1. Earl Foreman, *Petitioner*

2. Babcock & Wilcox Company, *Respondent*

3. Jim Waide, *Counsel for Petitioner*

4. Taylor B. Smith, *Counsel for Respondent*

In addition to the Petitioner and Respondent and counsel as listed, the parent company of the Respondent is McDermott International, Inc. and Respondent has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Contrary to the Statement of the Case as stated by Petitioner, there is much more to be considered with respect to the proceedings. As the record in the lower court will reflect, Respondent timely filed a Motion for Summary Judgment contending *inter alia* that Petitioner did not have a disability within the meaning of the Americans with Disabilities Act (42 U.S.C. § 12102, *et seq.*, (hereinafter referred to as the "Act"). This Motion was overruled and the case proceeded to trial. As shown in the Opinion of the Court of Appeals for the Fifth Circuit, at the conclusion of Petitioner's case Respondent moved for Judgment as a Matter of Law contending *inter alia* that Petitioner did not have a disability within the meaning of the Act. This was overruled and the case proceeded and at the conclusion of all the evidence, Respondent made a Renewed Motion for Judgment as a Matter of Law and the District Court granted the Motion.[1] Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and as reflected in the record below, on May 22, 1997, the Court of Appeals issued an Opinion affirming the action of the lower court. Subsequent thereto, Petitioner filed a Petition for Rehearing *en banc*, which was denied by the Court of Appeals on July 10, 1997, at which time the court issued a revised Opinion.[2] Thereafter, and though the mandate was issued on August 1, 1997, Petitioner has now filed this Petition requesting *certiorari*.

COUNTER-STATEMENT OF THE FACTS

Respondent Babcock & Wilcox Company ("B & W") operates a welding and steel fabrication facility in West Point,

1. Petitioners' petition has contained as Exhibit "B" the transcribed Opinion of the Court granting Judgment as a Matter of Law.

2. The revised Opinion is contained in the Petition for Rehearing as Appendix "C" and is reported at 117 F.3d 800 (1997).

Mississippi. (R. at Vol. III, p. 153). At its West Point plant B & W builds and welds boilers for industrial and utility use, and also supplies parts for these boilers. (R. at Vol. III, pp. 154-155). Other than the office building and the storeroom, B & W's West Point facility consists of two large buildings called "shops." (R. at Vol. III, p. 168). The two shops are where B & W's finished product, boilers, are assembled and welded. (R. at Vol. III, pp. 91, 169-172, 173). There are approximately 400 welding machines in the shops and three electrical substations with high voltage (13,000 volts) power lines running through them. (R. at Vol. III, pp. 89-90, 174).

In March 1994, Petitioner underwent surgery and had a pacemaker installed by Dr. David H. Mulholland. (R. at Vol. III, p. 81). Petitioner was referred to Dr. Mulholland by his treating physician, Dr. Andrzej Wartak. (R. at Vol. III, p. 9). Petitioner was placed on medical leave at the time of his surgery. (R. at Vol. III, p. 156).

Sometime after the time of his surgery, Petitioner presented to B & W a short term disability claim form signed by Dr. Wartak on May 3, 1994 stating that he must be off work from March 25, 1994 until June 13, 1994. (R. at Vol. III, pp. 81-82, 156-157, also Exhibit D-2). Around this same time, B & W received a letter from Dr. Mulholland, also dated May 3, 1994, stating that Petitioner was medically restricted from working within six feet of an arc welding machine, because of the possibility that the electrical noise generated by the welding machine would cause his pacemaker to function incorrectly. (R. at Vol. III, pp. 82-83, 157, also Exhibit P-4). Dr. Mulholland further restricted Petitioner from coming within 40-50 feet of several welding machines as well as power lines. (R. at Vol. III, pp. 81-83). These restrictions eliminated Petitioner's ability to enter B & W's shop area, which contains over 400 portable welding machines, stationary welding machines and high voltage power lines. (R. at Vol. III, pp. 92-94). *See infra,* pp. 3-4.

June 13, 1994 passed, and Petitioner did not return to work. (R. at Vol. III, pp. 156-159). Rather, Petitioner submitted another medical excuse dated June 22, 1994 from Dr. Wartak stating that Petitioner should be off work indefinitely. (R. at Vol. III, pp. 62-63, 156-157, also Exhibit D-3). At trial, Dr. Wartak testified that he signed the report requiring Petitioner to be off work indefinitely and agreed that if it was sent to B & W, "that [is] what they would have to go on." (R. at Vol. III, pp. 13-14).

Dr. Wartak stated that Petitioner is medically restricted from working near potent electro-magnetical fields, including welding machines and other machinery. (R. at Vol. III, p. 13). As far as Dr. Wartak understood, B & W was trying to find a job for Petitioner that would fit within his medical restrictions. (R. at Vol. III, pp. 14-15).

Much to B & W's surprise (because they thought Petitioner was off work indefinitely), on September 14, 1994, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission alleging that there were many jobs Petitioner could have performed at B & W, but that he was not allowed to return to work. (R. at Vol. III, pp. 158-160).

On September 26, 1994 B & W Personnel Manager Dale Ulbrich met with Petitioner and Union Representative Robert Shaffer for the purpose of discussing Petitioner's return to work and finding a job for Petitioner at B & W. (R. at Vol. III, pp. 159-160). Ulbrich was the sole person who had the responsibility and prerogative of Respondent to return employees such as Petitioner to employment from leaves of absence. (Vol. III, pp. 153-154).

Before his pacemaker was installed, Foreman had worked as an expeditor. (R. at Vol. III, p. 50). An expeditor "expedites" B & W's manufacturing process by making deliveries of

materials and supplies to the shops, where the finished products are welded and made. (R at Vol. III, pp. 90, 168). Although at trial, witnesses gave differing percentages, ranging from twenty to sixty percent, concerning the amount of time an expeditor spends making deliveries to the shop, even Petitioner conceded he spent at least twenty percent (20%) of his time as an expeditor making shop deliveries. (R. at Vol. III, pp. 70, 23, 25, 195). The ability to make deliveries into the plant is an essential function of the expeditor position. (R. at Vol. III, pp. 168, 174). As its name implies, the expeditor position exists to "expedite" deliveries of materials to different parts of the plant, including making deliveries to the shop area where approximately 400 welding machines, including numerous portable arc welders, are present, along with multiple electrical substations and power lines. *Id.* Since Petitioner's medical restrictions prevented him from being in the presence of electro-magnetical fields, and more specifically prevented him from coming within six feet of one arc welding machine, and from coming within 40-50 feet of several welding machines and high voltage lines, Petitioner could not enter the shop area to perform this essential function. (R. at Vol. III, pp. 92-94, 174-75, 178).

While B & W was committed to accommodating Petitioner, his medical restrictions not allowing him to come within six feet of one welding machine or to come within 40-50 feet of several welding machines, as well as power lines, prevented him from returning to the expeditor position, a position Petitioner held before his pacemaker was installed and the one to which he wanted to be returned. (R. at Vol. III, p. 94, 178). As testified by Personnel Manager Dale Ulbrich, B & W could not return Petitioner to the expeditor position for two reasons: (1) at the time of Petitioner's return there were no openings in the expeditor position (in fact, the only opening for which Petitioner was qualified under the collective bargaining agreement was in

the janitor position)[3]; and (2) Petitioner could not perform the essential functions of the job because of his medical restrictions. (R. at Vol. III, pp. 162, 178).

Respondent has a union at its facility and the *bona fide* seniority provisions of the collective bargaining agreement prevent an employee such as Petitioner from transferring into another job if he does not have seniority and has not previously worked in that position. (Vol. III, pp. 40, 69-70, 160-165, and 254).

Further, at the September 26 meeting, Petitioner did not suggest his return to any alternative positions, nor did he demand to be returned to the expeditor position. (R. at Vol. III, pp. 162-63). Shortly after the meeting, Petitioner returned to work at B & W in the janitor position, the only position for which he was "qualified" according to the collective bargaining agreement.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED INASMUCH AS THE FIFTH CIRCUIT WAS CORRECT IN ITS INTERPRETATION OF "DISABILITY".

Petitioner initially points out that "on its own motion" and without the point being raised by the employer, the Court of Appeals held that Petitioner had no disability. This, of course, as shown earlier in the Statement of the Case is an improper recitation and belied by the Opinion of the Fifth Circuit. To be sure, and as the Fifth Circuit held, a judgment of the District Court must be affirmed if the result is correct even if the

3. (R. at Vol. III, pp. 69-70). *See also infra*, pp. 25-30.

affirmance is on grounds not relied upon by the District Court (117 F.3d at 804).[4] Noteworthy is the fact that Petitioner desires not to discuss whether or not, in fact, Petitioner had a disability. Indeed, in all probability, this is because of the fact that the clear Opinion of the Fifth Circuit based upon uncontradicted factual records and the applicable law clearly reveals that Petitioner was not disabled. (*See* 117 F.3d 804-806). Rather, Petitioner makes the ingenuous (and factually incorrect) argument that the Fifth Circuit did not consider the "regarded as having a disability" prong. (*See* p. 7 of Petition for Writ of Certiorari). This, of course, is incorrect as the court gave a very clear and cogent analysis as to why Petitioner was not regarded by Respondent as having a disability. (*See discussion of Fifth Circuit at* 117 F.3d 806-807). Indeed, the record below reveals without contradiction but Petitioner never contended that he was disabled within the meaning of the Act, but only that Respondent considered him as such. Thus, it is somewhat novel that Petitioner now contends that this point was not considered. Indeed, and in view of the fact that Petitioner alleged only that he was "perceived" by his employer as having a disability and admitted quite clearly that there were many jobs he could have performed, he has limited himself to meeting the definition of disability only through the "regarded as having such an impairment".

Petitioner goes to great length in his Petition (p. 7) to attempt to quote testimony from a representative of Respondent concerning matters which Petitioner wishes to think constitute "regarded as" being disabled. However, the record reveals that

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4. Of course, in addition to finding that Petitioner was not disabled within the meaning of the Act, the Fifth Circuit proceeded further to find that in any event, Petitioner was not a qualified individual with a disability, that reasonable accommodation had, in fact, been made consistent with the factual situation presented and the collective bargaining agreement. Thus, in any event, the opinion below was correct.

the witness quoted, by his own testimony, did not have the responsibility to return employees on leaves of absence, and indeed, had no role to play in actually returning Petitioner to employment. (Vol. III, pp. 126-127, 153-154, 159, 164). Indeed, Personnel Manager Ulbrich, as shown by the uncontradicted facts, was the one who actually returned Petitioner to employment after expiration of his leave of absence. (Vol. III, p. 164). Thus, so much for "regarded as being disabled".

An employer does not "regard" the employee as disabled simply by finding the employee to be incapable of satisfying the singular demands of a particular job." *Marschand v. Norfolk and Western Ry. Co.*, 876 F. Supp. 1528, 1540-41 (N.D. Ind. 1995); *Byrne v. Bd. of Educ., Sch. of West Allis-West Milwaukee*, 979 F.2d 560, 565 (7th Cir. 1992); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993). To be sure, there is no dispute here among the circuits. Recently, the Ninth Circuit in *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997) had occasion to discuss the "regarded as" factor holding with the clearly established law that the fact that an employer may regard an individual as having a restriction to do one position but not foreclosing employment generally does not mean an employer regards one as having a disability. (121 F.3d at 541 citing cases). *See also Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997). Moreover, the factual situation here shows clearly Respondent, far from regarding Petitioner as having a disability within the meaning of the Act, actually met and counseled on September 26, 1994, with Petitioner as well as the union in an effort to find a suitable position. (*See* 117 F.3d at 807 n.10). Moreover, we are reminded that it was quite uncontradicted that as soon as Petitioner requested a meeting and as soon as Respondent learned that Petitioner was actually ready to return to work, a meeting was arranged to discuss with Petitioner his return to

work, which ultimately led to placing him in the position which he could perform based upon his medical restrictions and the union contract. (Vol. III, pp. 158-60; 162-63).

Cases cited by Petitioner do not support a contrary inference. *Holihan v. Lucky Stores*, Inc., 87 F.3d 362, 366 (9th Cir. 1996) simply shows that a plaintiff was terminated for excessive absence due to his aberrational behavior which the employer acknowledged was the reason for termination. Totally unlike the situation *sub judice*. Indeed, in the later Ninth Circuit decision of *Thompson v. Holy Family Hospital, cited infra*, the same Ninth Circuit went to great pains to distinguish *Holihan* as being an unusual situation relating to perception of an employee suffering from a disabling psychiatric condition. (121 F.3d 541, n.3). Certainly, the recent Ninth Circuit decision in *Thompson* supports the finding of the Court of Appeals in this case. *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), cited by Petitioner on p. 19, is likewise mischaracterized by Petitioner. Unlike the situation *sub judice*, the evidence there was quite clear that the employer regarded plaintiff as being unable to perform any job — quite the opposite from *sub judice*, and this was because, in *Miners*, there was an ultimatum of "treatment or discharge". Again, it is note-worthy to remember that here, Personnel Manager Ulbrich actually met with Petitioner to find him another job and did so — placing him in another position — not exactly the perception of "regarded as being disabled". Likewise, *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995) cited by Petitioner on p. 19, is mischaracterized. There the plaintiff was admittedly permanently disabled because of a prior workers' comp finding and all parties agreed as such. He was, thus, informed that he would be administratively terminated or placed on unpaid leave — again, a quite different situation from that *sub judice*, and indeed a quite different situation from the later Ninth Circuit decision of *Thompson v. Holy Family*, cited *supra*.

In other words, there is no conflict between the decision of the Court of Appeals for the Fifth Circuit and the law generally.

II.

THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER WAS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY.

Under Argument II, Petitioner makes the quantum leap that there was no accommodation (as shown herein-after, there was a clear accommodation and so found by the Court of Appeals). To be sure, it is settled law and beyond dispute that in order to be a qualified individual with a disability, an individual *must*, with or without reasonable accommodation, perform the essential functions of the employment position in question. Clearly, Petitioner was unable to perform the expeditor position, which was created essentially to move materials into the plant area where, as aforementioned, numerous electrical welders and electrical arc equipment was present. (*See Opinion of Court of Appeals at* 117 F.3d 808-809 n.11-12).[5] To be sure, as shown in the Record, Petitioner testified that an expeditor must spend at least twenty percent (20%) of his time making deliveries to the shop (Vol. III, p. 70), and Petitioner's chief witness, an employee who had been an expeditor for five (5) years, testified that expeditors spend at least one-third or thirty-three percent (33%)

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5. In discussing accommodation, Petitioner seems "to get the cart before the horse". Before one is entitled to protection of the ADA, including its reasonable accommodation provision, the individual must *first* establish he is a qualified individual with a disability, as set forth hereinafter. Unless a plaintiff can make such a showing, including that he or she can perform all the essential functions of the job, with or without reasonable accommodation, the court must grant an employer judgment as a matter of law. *See, e.g., White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995).

of their time making deliveries to the shop. (Vol. III, p. 25). This witness further testified that on the second shift in which Petitioner was employed, there were only two expeditors working and thus, both expeditors were required to make deliveries to the shop at the same time. (Vol. III, p. 28). Moreover, the Personnel Manager for Respondent explained clearly the reason why Respondent considers the requirement that all expeditors make deliveries to the shop as important and critical. (Vol. III, p. 171). To be sure, there was no inconsistency here, and as found by the Court of Appeals and other circuits, the process for determining what job duties were essential functions was properly followed. *See, e.g., Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995); *Cheatwood v. Roanoke Industries*, 891 F. Supp. 1528, 1537 (N.D. Ala. 1995) (court examines essential functions in light of EEOC regulations); *Harden v. Delta Air Lines*, 900 F. Supp. 493, 496-99 (S.D. Ga. 1995). When analyzing whether the Petitioner was a qualified individual with a disability, the *Milton* court examined the plaintiff's evidence concerning job duties and applied the Equal Employment Opportunity Commission ("EEOC") regulations concerning the determination of essential functions, and the evidence for supporting same. *Milton*, 53 F.3d at 1124. The *Milton* court's analysis is as follows:

> The initial inquiry in determining whether a job requisite is essential is whether an employer actually requires all employees in the particular position to perform the allegedly essential function. *See* 29 C.F.R. Pt. 1630, App. § 1630.2 (n). An employer's judgment is also relevant evidence to be considered, as are the terms of any collective bargaining agreement. *Id.* This inquiry is not intended to second guess the employer or to require him or her to lower company standards. *Id.*

> The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job. It is the employer's province to establish what a job is and what functions are required to perform it. The ADA simply requires that an individual with a disability's qualifications for a job are evaluated in relation to its essential functions.

Milton, 53 F.3d at 1124 (quoting in part EEOC Technical Assistance Manual at 11-18 (1992)). Furthermore, the EEOC regulations (29 C.F.R. § 1630.2(n)) specifically approved of in *Milton* identify what evidence is relevant when determining what functions are considered essential:

Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3)(i)-(vii); *see also Harden*, 900 F. Supp. at 496-99, (Court examines essential functions through use of EEOC regulations).

Personnel Manager Dale Ulbrich testified that if B & W did not require its expeditors to make shop deliveries, B & W's production process would be slowed considerably. (R. at Vol. III, pp. 173-74).

Moreover, expeditor Ronnie Cliett also in effect testified about the consequences of not requiring all expeditors to make deliveries to the shop. Cliett testified that at times on second shift, when there are only two expeditors working, both expeditors may be required to make deliveries to the shop at the same time. (R. at Vol. III, p. 28). Logically, if one expeditor could not make deliveries to the shop on the second shift, then the delivery of materials on that shift would be decreased by fifty percent (50%).

The testimony is uncontradicted that all expeditors, as an essential function, are expected to enter the shop on a regular and daily basis on numerous occasions, and Respondent has never had an expeditor that was not required to deliver into the shop. (Vol. III, pp. 170-171, 174).

As stated in *Milton*, "It is the employer's province to establish what a job is and what functions are required to perform it." *Milton*, 53 F.3d at 1124. There is absolutely nothing in the record, as analyzed by relevant case law and EEOC regulations, which would lead to any result contrary to the District Court's finding — making deliveries to the shop area is an essential function of the expeditor position.

Aside from this, it is important to note that, as the Court of Appeals held, reasonable accommodation does not require removing or eliminating any of the essential functions of a position. (117 F.3d 809-810). Contrary to Petitioner's argument, the Fifth Circuit was correct in holding that Respondent was not required, in effect, to create a new position for Petitioner by allowing him to perform only those functions of the expeditor position which he felt he could perform nor was Respondent required to make or create a job for Petitioner.

It is now well-settled that the ADA does not require employers like B & W to create a new position to accommodate an allegedly disabled worker, or to otherwise alter the essential functions of the worker's position. *See Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995); *McDonald v. State of Kan. Dep't of Corrections*, 880 F. Supp. 1416, 1423 (D.C. Kan. 1995); *Cheatwood*, 891 F. Supp. at 1537; *See, e.g., Carrozza v. Howard County*, 847 F. Supp. 365, 368 (D. Md. 1994), *aff'd*, 45 F.3d 425 (4th Cir. 1995) (court refuses to read the ADA as requiring an employer to restructure a job as to change its fundamental requirements); *Otis v. Canadian Valley-Reeves Meat Co.*, 884 F. Supp. 446, 449 (D. Okla. 1994), *aff'd*, 52 F.3d 338 (10th Cir. 1995) (the law is clear that reallocation of job duties constitutes a change in the essential function of Petitioner's job and is not required under the ADA); *Cheatwood v. Roanoke Industries*, 891 F. Supp. at 1537, (the ADA does not require employers to modify the actual duties of a job in order to make an accommodation for individuals who are not physically capable of performing them); *Feliberty v. Kemper Corp.*, 1995 WL 35398, 4 AD Cases 875, 877-78 (M.D. Ill. 1995) (medical director's requested accommodation of restricting his use of computer which was an essential function of the job, held unreasonable because it required the elimination of an essential function of his job.); *Milton*, 53 F.3d at 1124-25, ("an employer is not required by the ADA to reallocate job duties in order to

change the essential functions of a job); *Gilbert v. Frank*, 949 F.2d 637, 644 (2d Cir. 1991)."); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995) (an employer need not reallocate the essential functions of a job which a qualified individual *must* perform.); *Harden*, 900 F. Supp. at 498; *McDonald*, 880 F. Supp. 1416; *Santos v. Port Authority of New York*, 4 AD Cases 1245, 1995 WL 431336 (S.D.N.Y. 1995).

Additionally, the EEOC's ADA Interpretative Guidance interpreting 29 C.F.R. § 1630.2(o) concerning an employer's reasonable accommodation requirement, states that "An employer or other covered entity is not required to reallocate essential functions." Moreover, the EEOC Technical Assistance Manual concerning Title I of the ADA, Section 3.10, concerning job restructuring states: "However, an employer is not required to reallocate essential functions of a job as a reasonable accommodation." Thus, both case law and the EEOC agree that B & W was not required to reallocate or waive the essential function of making deliveries to the shop for Petitioner.

To be sure, there is no conflict among the circuits and Petitioner was not a qualified individual. *See, e.g., Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (ADA protects only Petitioner who can establish he or she is a qualified individual with a disability); *Daugherty*, 56 F.3d at 698-700 (same); *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996). *See also Kramer v. State of Florida*, 117 F.3d 1258, 1264 (11th Cir. 1997) (ADA defines a qualified individual as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires — plaintiffs admitted they could perform the essential functions and, in short, thus are not qualified individuals with a disability.)

Petitioner cites *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996). Petitioner would have us believe that this case is authority for the proposition that there must be an attempt to restructure the plaintiff's job to accommodate him — which is not the factual situation presented in *Bultemeyer*. Indeed, in *Bultemeyer*, there was a factual dispute as to whether the employee could perform the essential functions of his job, either with or without reasonable accommodation. There, the court found that plaintiff was not given a chance to demonstrate he could perform the essential function and held:

> . . . in other words, had F.W.C.S. accommodated Bultemeyer by finding him another position or by simply sitting down with him and talking about the situation, he may have been willing and able to take the physical and report for work. . . .

(100 F.3d at 1285).

Obviously, it is undisputed *sub judice*, that Respondent did "sit down" with Petitioner for the specific purpose of placing him in a position for which he was eligible with regard to his medical restriction of not entering the plant and accommodating him with positions for which he was qualified under the union contract. This was also accomplished! Thus, far from being in conflict with *Bultemeyer*, the Court of Appeals in the instant case, squarely fits within *Bultemeyer*.

For the same reason, Petitioner's citation of *Tuck v. HCH Health Services of Tenn., Inc.*, 7 F.3d 465 (6th Cir. 1993), is again misplaced. *Tuck* does not stand for the proposition that the duty of reasonable accommodation requires an employer to modify there, a nurse's position. Indeed, in *Tuck*, after an injury, the employer made arrangements for plaintiff to be moved to another open position. (*Id.* at 470) (the exact situation *sub*

judice). The court found that, though plaintiff may not have been able to perform the essential requirements of her initial job (and thus, was not eligible for the same), there were other nursing positions open for which the court found that plaintiff could perform the essential functions. Thus, this case reaffirms that reasonable accommodation does not require elimination of essential functions, but requires an employee be considered for a vacancy which may be existing and for which the employee is "qualified". This is exactly what happened *sub judice* — the matter was reviewed by Respondent with Petitioner and Petitioner was offered and moved into a position in which he could perform the essential functions and which was permissible under the *bona fide* union collective bargaining contract.

III.

THE ACTION OF THE FIFTH CIRCUIT IN UPHOLDING THE VALIDITY OF THE COLLECTIVE BARGAINING CONTRACT WITH THE UNION WAS APPROPRIATE.

Perhaps more of a factual analysis is necessary here. In the Petition (p. 11), Petitioner alleges that he could have been given the position of "receiving specialist"; however, Petitioner admits that the person who received the position had more seniority over Petitioner. (Petition at p. 11). Next Petitioner alleges that he should have been given a materialsman position but was not given one because the union contract provides that only persons who have previously held such a position would be first offered the job and admittedly, by Petitioner's own admission, he was not so qualified. (Petition at pp. 29-30). Petitioner then makes an allegation that the materialmans position had been divided into subcategories (a) and (b) under the union contract, but his cite to the Record is erroneous in that he was referring to another position of Material Handler A, which was a position Petitioner

had never held and, thus, for which he was not eligible. (Vol. III, p. 222). Thus so much for misconstruing the uncontradicted facts![6] Under the collective bargaining agreement, B & W may not place an employee in a job classification unless he or she is "qualified" (*i.e.*, has previously held that job position) and possesses the seniority to hold that position. (R. at Vol. III, pp. 40, 164-65). Collective Bargaining Agreement, § 8.03 (Exhibit D-6). Thus, if B & W places an employee in a job position and the employee does not possess the requisite seniority and/or has not previously held the position, B & W violates the collective bargaining agreement. (R. at Vol. III, pp. 161-163, 164-165).

Indeed, Petitioner was not given the materialmans position — not only because he was not qualified by his own admission, but of more importance, because it is uncontradicted that classification does not and did not exist, and had not been an active classification for a considerable period of time. (Vol. III, p. 180). The law is legion to the effect Respondent was not required to make or create a position where one did not exist for Petitioner. *Foreman v. Babcock & Wilcox*, 117 F.3d 800, 809

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6. Personnel Manager Dale Ulbrich testified that Petitioner was not reassigned to the materialmans position for significant reasons that Petitioner omitted: "we don't have anybody in the classification materials man. That's an old classification we don't have any more." (R. at Vol. III, p. 180). Accordingly, this uncontradicted evidence reflects that not only would B & W have to violate the collective bargaining agreement to place Petitioner in the materials man position ahead of other employees with more seniority, in fact it would also have to create such a position! The ADA does not require this much.

Further, Ulbrich also testified that he could not place Petitioner in the newly created receiving specialist position because ex-expeditor Jimmy Arnold, who had more seniority than plaintiff, was placed in that position. (R. at Vol. III, pp. 191-192). "Employees go into jobs based on their seniority. [Arnold] had the seniority to go into that job." (R. at Vol. III, p. 192).

(1997) and *Turco v. Hoechst Celanese Chemical Group, Inc.*, 101 F.3d 1090, 1094 (5th Cir. 1996). Indeed, Petitioner was not given the receiving specialist position because the person who received it had more seniority and thus, was required under the union contract to be given preference to the same and the other position mentioned was one for which he was not qualified — but also, it no longer existed! (Vol. III, pp. 191-192).

Petitioner's argument, that he was somehow entitled to a preference and that the collective bargaining agreement violates the ADA, mischaracterizes the facts and ignores the overwhelming weight of authority. *See, e.g., Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996); *Benson*, 62 F.3d at 1114, (ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained *bona fide* seniority rights of other employees); *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995) (same); *Milton*, 53 F.3d at 1125 (same); *Daugherty*, 56 F.3d at 700. Contrary to the recitation of Petitioner, the Court of Appeals, almost without exception, adheres to the principle embraced by the Court of Appeals in this case. To be sure, the *possible* exception cited by Petitioner in his Brief does not warrant a writ of *certiorari*.

In *Eckles*, cited *supra*, the court found analogous cases decided under the Rehabilitation Act which did not require reassignment of a disabled employee in violation of a *bona fide* seniority system, and that a virtual *per se* rule has emerged that such reassignment is not required under the Rehabilitation Act's duty to reasonably accommodate. *Id.* at 1047-48 (citing *Shea v. Tisch*, 870 F.2d 786, 789-90 (1st Cir. 1989) (*per curiam*); *Carter v. Tisch*, 822 F.2d 465, 467-69 (4th Cir. 1987); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1251-52 (6th Cir. 1985); *Mason v. Frank*, 32 F.3d 315, 319-20 (8th Cir. 1994); *Daubert v. United States Postal Service*, 733 F.2d 1367, 1370 (10th Cir. 1984)). In addition, the *Eckles* court also found that the

legislative history of the ADA strongly supported the position that "bumping" another employee out of a position to create a vacancy for a disabled individual is not required. *Eckles*, 94 F.3d at 1049.

In upholding the properly negotiated union contract, the Court of Appeals quoted from *Daugherty*, 56 F.3d 695, *cert. denied*, __ U.S. __, 116 S. Ct. 1263, 134 L. Ed. 2d 211 (1996) the well-established law that the Americans with Disabilities Act is not an affirmative action statute but "prohibits employment discrimination against qualified individuals with disabilities, no more and no less". (117 F.3d at 810).

The ADA does not require an employer like B & W to accommodate a worker in a manner that would violate the rights of other employees under a collective bargaining agreement.[7] *See, e.g., Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *Mason v. Frank*, 32 F.3d 315, 319-20 (8th Cir. 1994) (Rehabilitation Act); *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) (*per curiam*) (same); *Carter v. Tisch*, 822 F.2d 465, 467-69 (4th Cir. 1987) (same); *Daubert*, 733 F.2d at 1370 (10th Cir. 1984) (same).[8]

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7. As clearly cited by the Court of Appeals, Petitioner testified that he actually did not want and was not asking the Court to intrude into or violate the union contract. (117 F.3d 809 n.13).

8. It is likewise important to note that notwithstanding the argument concerning the validity of the Collective Bargaining Contract, it is clear here that Petitioner did not have a disability, moreover, was not a qualified individual with a disability, but in any event, Respondent complied with the appropriate law relative to reasonable accommodation. Therefore, because these factors, individually and collectively, precluded Petitioner from recovering it would not be appropriate for the Court to grant *certiorari* on the Collective Bargaining Agreement because regardless of

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IV.

IN ANY EVENT, RESPONDENT REASONABLY ACCOMMODATED PETITIONER.

B & W's efforts to find Petitioner alternative employment positions, and Petitioner's acceptance and employment in a janitor position were more than a reasonable accommodation of Petitioner's alleged disability.[9] Accordingly, B & W's good-faith efforts to reasonably accommodate Petitioner protect it from liability in the present case. *See, e.g., Marschand*, 876 F. Supp. at 1543. By providing Petitioner with a janitorial job, B & W attempted in good faith to reasonably accommodate Petitioner's restrictions from working near welding equipment, as identified by his physicians.

Kuehl v. Wal-Mart Stores, Inc., 909 F. Supp. 794 (D. Colo. 1995) is a factually analogous case. In *Kuehl*, the entire basis of the ADA Petitioner's claim was that her employer Wal-Mart would not accommodate her chronic tibula tendinitis with the single acceptable accommodation of a stool to sit on as needed during the course of her shift as a door greeter. Wal-Mart offered the plaintiff two accommodations as alternatives to providing her with a stool. First, it offered to let her work a split shift that was compatible with the medical restrictions placed on the

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(Cont'd)
the holding relative to the Collective Bargaining Agreement, Petitioner is not entitled to recover! **Thus, even a contrary finding by this Court on the Fifth Circuit's Opinion re: the Collective Bargaining Agreement, still would not mandate reversal of the Opinion below!**

9. Respondent notes that B & W's janitor position is not the typical near-minimum wage position that the "janitor" title connotes; plaintiff was paid $10.16 per hour while working as a janitor for B & W. (R. at Vol. III, p. 96). Thus, B & W reasonably accommodated plaintiff.

plaintiff by her doctors. Wal-Mart also offered the plaintiff a job as a cashier in the tire mounting department, which would have allowed her to sit down periodically. The plaintiff rejected both of these alternative accommodations and continued to insist on accommodation in the form of a stool to use while on duty as a door greeter.

Contrary to plaintiff's desired accommodation, the court held that the accommodations offered by Wal-Mart were consistent with the ADA's definition of acceptable reasonable accommodations and met its ADA requirements. *Id.*, *citing* 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o). In so holding, the Court stated:

> "[T]he purpose of an anti-discrimination act is not to provide those traditionally discriminated against with preferential treatment but rather with treatment equal to that accorded to others." *Robinson v. City of Friendswood*, 890 F. Supp. 616, 620 (D. Tex. 1995), *citing Wimberly v. Labor and Indus. Relations Comm'n of Mo.*, 479 U.S. 511 (1987). "The ADA does not require that an employer provide the best accommodation possible to a disabled employee." *Eckles*, 890 F. Supp. at 1399. "Nor is an employer required to accommodate a disabled employee in exactly the way he or she requests." *Id.* "The employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." 29 C.F.R. Part 1630, Appendix, § 1630.9.

Id. at p. 803.

Accordingly, accommodation of Petitioner by placing him in the janitor position met its responsibility under the ADA.

CONCLUSION

Petitioner did not have a disability within the meaning of the Act, and in any event, was not a qualified individual with a disability. Moreover, and in any event, Respondent made reasonable accommodation consistent with Petitioner's medical restriction and the valid requirements of the collective bargaining contract. In doing this, Respondent was properly cognizant of the fact that while employment discrimination against disabled persons was prohibited, the Act does not give such persons priority in reassignments over those who are not disabled. (*See* Ct. App. Opinion at 117 F.3d at 810).

Simply put, the Petition is without merit and should be denied.

Respectfully submitted,

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